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Procedural Due Process in Peno-Correctional Administration: Progression and Regression

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NOTES AND COMMENTS

PROCEDURAL DUE PROCESS IN PENO-CORRECTIONAL ADMINISTRATION: PROGRESSION AND REGRESSION

INTRODUCTION

The term liberty to the average citizen lends itself to a variety of subjective definitions, but to the prison inmate it can mean just one thing — freedom from incarceration. Therefore, parole, purely a statutory benefit[1] designed to boost the correctional cycle, offers the prisoner an opportunity to extricate himself from the confines of the prison walls and rejoin society. Its outward scheme is simplistic, *i.e.*, to protect the public while taking the calculated risk of conditionally releasing the convict.[2] Like parole, good-time credits afford the inmate an opportunity to gain an early release from prison. They too are gauged and computed by his behavioral habits while in the confines of a correctional institution.

However, it should be noted that neither the granting of parole nor the accrual of good time credits is irrevocable. Therefore the liberty, which the parolee possesses or the prisoner with the number of good-time days to his credit seeks, may be taken away as a result of a deviation from the prescribed standard of conduct. Consequently, the prisoner finds himself again faced with the possibility of serving the full term of his sentence. How does this come about? What rights of procedural due process are accorded him in determining the deprivation of his liberty? Moreover, what new developments are there in collateral areas of law which have given impetus for procedural change in the peno-correctional area? These are the main questions upon which this paper will focus its attention.

At the outset, a factor to be taken into account is that procedural due process is currently an area of much judicial activity. Decisions

[1] N.Y. CORREC. LAW art. 8 (McKinney 1968). *See, e.g.*, Cohen, *Due Process, Equal Protection, and State Parole Revocation Proceedings*, 42 U. COLO. L. REV. 197 (1970); Note, *Constitutional Law: Parole Status and the Privilege Concept*, 1969 DUKE L.J. 139 [hereinafter *Privilege Concept*]; Note, *Parole Revocation in the Federal System*, 56 GA. L.J. 705 (1968); Note, *Due Process: The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497 (1968); Note, *Rights Versus Results: Quo Vadis Due Process for Parolees*, 1 PACIFIC L.J. 321 (1970). [hereinafter *Quo Vadis*]. *See also* Ughbanks v. Armstrong, 208 U.S. 481 (1908).

[2] Note, *Discretionary Revocation of Probation and Parole: The Import of* Mempa v. Rhay *to the Present System*, 4 U. SAN FRANCISCO L. REV. 160, 168 (1969) [hereinafter *Discretionary Revocation*].

interpreting the scope of constitutional guarantees of due process have not only affected the rights of those in a trial situation, but they have been concerned with the safeguards of those participating in administrative proceedings as well. Therefore, it is useful to sort out the strands of development, *i.e.*, the basis for the original granting or denial of due process rights, the present status of the law and the rationales therefor. These developments will then be analyzed in light of their predictive value, if any, for the future extension or withdrawal of prisoner's rights by the courts.

THEORIES UTILIZED TO DENY PROCEDURAL DUE PROCESS

As previously noted, parole is essentially an early release from a prison sentence upon meeting and adhering to the various standards of behavior set down by a parental body known commonly as the parole board.[3] Since it has no basis in common law this mode of reform[4] is strictly a product of statutory creation. This being the case, a number of rationales have been utilized to reach the conclusion that no rights of procedural due process accrue to a parolee facing the termination of his conditional freedom. The *ratio decidendi*, most commonly espoused by the courts are the contract theory, *parens patriae*, the right-privilege distinction, the theory of protective custody, and the exhaustion of constitutional rights theory.

The Contract Theory

The contract theory in many instances involves an early release hinging upon the parolee's promise to accede to any conditions the state may require to be met. Thus, it is deemed an offer which the inmate may accept or reject.[5] In other jurisdictions which make it mandatory for the prisoner to consent, such consent is deemed a waiver to a later attack on procedural due process grounds.[6]

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3 *See Privilege Concept, supra* note 1, at 142.

4 Purportedly, the main purpose of parole is to rehabilitate and reduce recidivism. Several factors are evaluated in considering a prisoner for release. Primarily, his record is of vital importance but money is also a consideration, *i.e.*, a successful program of parole can cut down on overcrowding and also pare the cost of feeding and clothing. In addition, a man may be released to keep his family from becoming a public charge or in hopes that he may make restitution. Comment, *Due Process and Revocation of Conditional Liberty*, 12 WAYNE L. REV. 638, 639 (1966) [hereinafter *Conditional Liberty*].

5 Comment, *Parole Revocation Hearings—Pro Justicia or Pro Camera Stellata?*, 10 SANTA CLARA L. REV. 319, 331 (1970) [hereinafter *Parole Revocation*].

6 However, it has been pointed out that such a contract is not one between equals, as the conditions are imposed rather than meted out between the parties. Thus, if it can be called a contract at all, it is one of adhesion. *Conditional Liberty, supra* note 4, at 645-46.

Parens Patriae

The most current rationale voiced by the courts for the deprivation of due process where a parolee faces revocation is the *parens patriae* theory. This was espoused by the now Chief Justice Burger in *Hyser v. Reed*[7] where it was held that procedural due process was not a constitutional prerequisite in federal parole revocation hearings. He maintained that the congressional intent in establishing the parole board was to facilitate a prisoner's rehabilitation and restoration to society. This being the case, it was opined that there were no adverse or conflicting objectives in such a function and that it could not be likened to a criminal prosecution.[8] The role of the board in revocation was analogized to that of a parent withdrawing a privilege from a misdirected infant and not as a punitive measure for the abuse of that privilege.[9]

The continued authority for this theory is somewhat suspect, however, in view of its rejection by the Supreme Court in *In Re Gault*.[10] There, the discussion was limited to proceedings which determine whether a juvenile's delinquency[11] is due to some purported misbehavior on his part which in turn may cause his commitment to a state institution.[12] The possible loss of liberty for a period of years was construed to be of comparable gravity to a penalty for a felony prosecution.[13] Therefore, it was pointed out that the juvenile needs the aid of counsel to handle the problems of law, to conduct the inquiry of facts, to insure regularity, and to determine the possible tactics of defense.[14] The Court reasoned that, while due process requirements will make the proceed-

7 318 F.2d 225 (D.C. Cir.), *cert. denied sub nom.* Thompson v. United States Board of Parole, 375 U.S. 957 (1963).

8 *Id.* at 237.

9 *Id. But see* Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 814 (1961), where it's felt that the elements of revocation are very similar to that of a criminal trial. He states that in each instance the question of fact focuses on the past behavior of the individual, *i.e.*, whether there has been a violation of the conditions of release or whether the law has been criminally violated.

10 387 U.S. 1 (1967).

11 The Court traced the juvenile court movement and explained how it evolved out of a belief that society was not to decide whether a child was guilty or innocent but to guide him through his infancy. The underlying theory was that the proceeding was not adversary in nature, and therefore the courts' role was that of *parens patriae*. This rationale was taken from chancery courts which had utilized it to express the state's power to act in *loco parentis* for the preservation of the infant and his property interests. Thus, this idea that a child had a right to custody and not liberty served as a springboard to the idea that the child suffers no deprivation of his rights. Justice Fortas, speaking for the majority, said "[t]he constitutional and theoretical basis for this system is—to say the least—debatable." *Id.* at 15-17.

12 *Id.* at 13.

13 *Id.* at 36.

14 *Id.*

ings orderly in many instances and in contested cases will bring forth some facets of the adversary system, it did not follow that the results would be more harsh.[15]

Consequently, *Gault* has cast a serious dispersion on the viability of any use of the *parens patriae* theory. The rationale behind its application to juvenile hearings is substantially the same as that of parole revocation proceedings.[16] In both categories the parental authority is deemed to have a rehabilitative rather than a punitive purpose, and yet it determines an individual's immediate future on the basis of his past behavioral conduct. It appears that *Gault* requires minimal procedural safeguards for such factual decisions.[17]

Extending the due process attitude present in *Gault*,[18] the New York Court of Appeals pursued its quest of protecting and furthering the interests of parolees in the case of *People ex rel Silpert v. Cohen*.[19] Any apprehension that juvenile parolees would be treated differently than adult parolees was allayed in *Silpert*. There the Court held that the existing rule, which renders parole revocation hearings and the concurrent aid of counsel at such hearings a constitutional guarantee enjoyed by adult parolees,[20] was equally applicable to juvenile delinquents.

It is interesting to note that the Court mandated the due process requirements of notice and the presence of counsel[21] despite the exist-

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15 *Id.* at 27.

16 318 F.2d at 225. But, this attitude is to be countered by the poignant expression favoring due process in *People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, 385-86, 267 N.E.2d 238, 243-44, 318 N.Y.S.2d 449, 456-57 (1971), where the Court justified the application of due process by stating that:

> . . . the parole system is an enlightened effort on the part of society to rehabilitate convicted criminals. Although few circumstances could better further that purpose than a belief on the part of such offenders in a fair and objective parole procedure, hardly anything could more seriously impede progress toward that important goal than a belief on their part that the law's machinery is arbitrary, too busy or impervious to the facts. The desired end can become a reality only by requiring obedience to the demands of due process and granting parolees a hearing at which they will be represented by counsel.

17 Justice Harlan (concurring in part and dissenting in part) commented that one basic premise of our constitutional government is that an individual, facing deprivation of liberty or property, is entitled to a proceeding in the tradition of due process. Although he viewed the state as acting in *loco parentis*, and did not feel that a juvenile should be accorded those safeguards available to one in a criminal prosecution, he nevertheless stated that there is some constitutional obligation to afford due process. 387 U.S. at 65-72.

18 The due process and fundamental fairness requirements promulgated by *Gault* are: "1) Notice of the charges; 2) right to counsel; 3) right to confrontation and cross-examination; 4) privilege against self-incrimination; 5) right to a transcript of the proceedings; and 6) right to appellate review." *Id.* at 10.

19 29 N.Y.2d 12, — N.E.2d —, — N.Y.S.2d — (1971).

20 *See* note 108 *infra*; United States *ex rel.* Bey v. Connecticut State Board of Parole, — F.2d — (2d Cir. 1971); Goolsby v. Gagnon, 322 F. Supp. 460 (E.D. Wis. 1971).

21 In upholding these requirements the Court expressly discarded the contentions that such safeguards will vitiate the remedial effectiveness between the juvenile and his social

ence of section 437 of the New York Social Services Law which actually authorizes the revocation of parole and the immediate return of juveniles to training schools without the benefit of any type of hearing. Such a hearing was characterized by the Court as an "accusatory proceeding" where the determination of liberty or imprisonment for the parolee is the consequence of a specific review of alleged parolee misconduct. In addition, the presence of counsel was deemed necessary to ensure a proper presentation of the facts to the reviewing tribunal.[22]

Right-Privilege Distinction

The right-privilege distinction is most frequently employed to explain the denial of any procedural rights.[23] The Supreme Court in *Ughbanks v. Armstrong*[24] held that parole is not a constitutional right and is instead a "present" from the state to the prisoner. This appears to be the foundation for the doctrine espoused in *Escoe v. Zerbst*,[25] the most often quoted case in support of this theory.[26] Essentially, the *Escoe* rationale was based on the premise that the board is providing the parolee with parole as a matter of grace and he therefore should neither expect nor seek due process.[27] However, there is evidence that this doctrine is eroding. It was held in *Greene v. McElroy*[28] that although one may not have a right to a specific thing, once that right is given it cannot be taken away by any method inconsistent with due process.[29] More recently the Court extended this approach to the area of public assistance[30] when it ruled that such aid is a statutory right and not a privilege.[31] These benefits were deemed to be statutory entitlements whose revocation entailed "state action that adjudicates important

worker, and that the existence of an attorney will act to transfer such a proceeding into an actual trial which would unnecessarily prolong the revocation proceedings.

22 29 N.Y.2d at 16, — N.E.2d at —, — N.Y.S.2d at — (1971).

23 *Parole Revocation, supra* note 5, at 331.

24 208 U.S. 481 (1908).

25 295 U.S. 490 (1935).

26 There, the Court was not in accord with the petitioner's argument that the privilege of probation had any constitutional basis other than that provided by statute. It was opined that since probation was an act of grace to one convicted of a crime, its duration was subject to Congressional control. *Id.* at 493.

27 Thus, the prisoner was deemed not to be a citizen with corresponding procedural rights but was viewed as a felon merely at large at the whim of the state. *Id.; Quo Vadis, supra* note 1, at 331.

28 360 U.S. 474 (1969).

29 In *McElroy* security clearance had previously been granted to the petitioner, a private employee, and was then taken away by the Defense Department in a proceeding that did not afford him the opportunity of cross-examination or confrontation. Consequently, he was discharged and was unable to obtain a similar position elsewhere. *Id.*

30 Goldberg v. Kelly, 397 U.S. 254 (1970).

31 *Id.* at 262.

rights."[32] In addition, the Court reasoned that the identical interests of government that condone welfare, seek its unimpeded distribution to eligible recipients as well.[33] Consequently, the recipient was held to be entitled to obtain an attorney at will.[34] Although the Court would not go as far as to mandate the right to counsel at the hearing, it did state that the use of such would be beneficial, *i.e.*, "[c]ounsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient."[35]

In conjunction with this, it has been ruled that the termination of a private citizen's tenancy by the government cannot be accomplished without first providing adequate procedural safeguards "even if public housing could be deemed a privilege."[36]

Constructive Custody

Constructive custody is the view that parole is merely an extension of the prison walls and since the convict is not free to merely roll the walls back he has no right to any procedural safeguards.[37]

However, in California, the constructive custody theory has been somewhat discarded and replaced by one of "conditional freedom."[38] This places the parolee somewhere in limbo between constructive custody[39] and actual liberty and has been deemed to mean that, but for the conditions of release the parolee is a free man.[40] Seen in this light it appears to be as much a fiction as constructive custody.[41]

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32 *Id.*

33 *Id.* at 265.

34 *Id.* at 270.

35 *Id.* at 270-71

36 Escalera v. New York City Housing Authority, 425 F.2d 853, 861 (2d Cir. 1970). Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968), makes an interesting point about the fourteenth amendment. In his claim that the state must observe due process he reflects on the fact that ". . . the amendment does not say that 'no State, except when acting in a proprietary capacity,' shall deny due process; rather it makes no distinction at all respecting the capacity in which the state acts." *Id.* at 1461. Furthermore, he states, that there is no basis for such a distinction even if the fourteenth amendment were to distinguish between governmental and proprietary action as ". . . it is difficult to see any need to vouchsafe to government the prerogative of arbitrary power or of fundamental unfairness in its conduct of a public undertaking." *Id.*

37 *Conditional Liberty, supra* note 4, at 646.

38 *Parole Revocation, supra* note 5, at 332.

39 This theory attains a fictional status as the board maintains that the parolee is in custody through its parole agent but this ". . . is not actual custody, and in fact, not custody at all, ..." *Id.*

40 *Id.*

41 *Id. See also* Burns v. United States, 287 U.S. 216 (1932) for an explanation of the use of the exhaustion of constitutional rights theory in denying counsel at a probation revocation proceeding. The underlying rationale here is that due process terminates with

COLLATERAL DEVELOPMENTS

Probation Revocation

It has already been noted briefly that numerous strides in collateral areas of law have led to the establishment of at least minimal due process standards.[42] The inroads made in these vicinages demonstrates a definite trend towards the development of procedural safeguards where administrative hearings perform a governmental function. Especially pertinent to developments in parole law are changes occurring in the related area of probation. Fundamentally, probation permits the conditional freedom of one convicted of a relatively innocuous offense as long as he conforms to certain prescribed requirements.[43]

The case of primary import in this realm is *Mempa v. Rhay*.[44] In *Mempa* each petitioner had been placed on probation for a crime committed. In Mempa's case it was joyriding and in Walkling's (the other petitioner) it was second degree burglary.[45] After surveying the factual backgrounds the Court concluded that there was a mandate to provide counsel to assist ". . . in marshalling the facts, introducing evidence of mitigating circumstances, and in general aiding and assisting the defendant to present his case . . . ."[46] In essence, counsel was seen as a critical element in the proceedings since lack thereof would lead to the possible loss of certain legal rights.[47] Apparently, the Court was moved to this conclusion by the complexity of the probation situation where the term and imposition of sentence on the prior guilty plea was grounded upon an offense for which the accused had never been prosecuted.[48]

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the trial. Thus, the presumption of innocence has disappeared and the interest of society becomes foremost. The further this theory is advocated the less one must do to be declared in violation of his conditional liberty. *Discretionary Revocation, supra* note 1, at 161.

42 *See* 397 U.S. 254 (1970); 387 U.S. 1 (1966); 360 U.S. 474 (1959).

43 *Discretionary Revocation, supra* note 2, at 160.

44 389 U.S. 128 (1967).

45 *Id.* Four months later it was moved that Mempa's probation be taken away on the grounds that he was involved in a burglary. He went to the hearing without benefit of counsel nor was any inquiry made in regard to such. At the hearing he admitted an involvement in the crime. Moreover, the probation officer, without any cross-examination, was permitted to state that he had information regarding Mempa's participation in the burglary and that Mempa had previously lied to him.

Walkling, when brought before the court, sought and was granted a one week's recess to retain counsel. At the later hearing his counsel did not appear, however, and after a wait of fifteen minutes the court proceeded on with the session. There was no offer of counsel nor would there have been any if he had requested it. His probation was revoked on the hearsay evidence of his probation officer. *Id.* at 130-32.

46 *Id.* at 135.

47 *Id.*

48 *Id.* at 137.

The *Mempa* setting presents a close analogy to parole revocation. But there has been one main weakness in predicting parole developments from the decision, *i.e.*, its vagueness and uncertainty have led to diverse reactions.[49] However, *Hewett v. State of North Carolina*,[50] a recent Fourth Circuit decision, may be indicative of a judicial trend towards clarification. There, the court pointed out that the probationer's liberty hinges upon the decision reached at the revocation hearing and that substantial rights can be affected[51] since the loss of such freedom is a possible consequence of the proceeding.[52] Viewing the right-privilege distinction, the court reasoned that once a state institutes a probation system for those convicted of a crime it must do so in accord with constitutional privileges despite the fact that probation is not a constitutional requirement.[53] Thus, liberty was discerned to be a right which mandates the protection of counsel.[54] The effect that *Mempa* and *Hewett* have upon parole revocation can be seen by taking a cursory glance at *Escoe v. Zerbst*,[55] which may be considered substantially modified or even possibly overruled *sub silentio* by *Mempa*.[56] As previously noted, *Escoe* prevented the extension of a right to a hearing for probationers and by analogy was similarly applied to parolees.[57] However, *Mempa's* grant of representation by counsel at a probation revocation proceeding means that there first must have been a right to a hearing before the question of counsel could have been decided. Thus, it appears that the logic of *Escoe* is no longer applicable to a probation or parole revocation situation.[58]

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49 In the Tenth Circuit the *Mempa* rationale was not held to apply to parole revocation hearings. Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968). There the court based its holding on fact and opined that parole revocation could not be seen in the same light as probation. *But see* People *ex rel.* Combs v. LaVallee, 29 App. Div. 2d 128, 286 N.Y.S.2d 600 (4th Dep't 1968).

50 415 F.2d 1316 (4th Cir. 1969).

51 *Id.* at 1323.

52 *Id.* at 1322-23.

53 *Id.*

54 Actually, one fundamental difference between the probationer and the parolee is that the parolee is subject to the supervision of an administrative agency while the probationer is generally within the purview of the court. Another distinction is that the parolee's sentence has already been determined but a violation by either individual may result in a loss of the same thing—liberty.

55 295 U.S. 490 (1934).

56 *See* Warren v. Michigan Parole Board, 23 Mich. App. 754, 763, 179 N.W.2d 664, 668 (1970).

57 *See* note 25 *supra*, and accompanying text.

58 *Query*, why are the courts, previously so anxious to analogize *Escoe* to parole, now so hesitant to do the same with *Mempa*?

59 306 F. Supp. 1 (D. Mass. 1969).

Revocation of Good Time

Good-time credits are days which may be subtracted from a convict's sentence and result in his early release from prison. Their computation is based on the prisoner's good behavior, while their revocation can come from any alleged infraction of prison rules. Significant for the purpose of this discussion are the safeguards accorded a prisoner facing withdrawal of accrued good time.

Decisional results on the federal level have varied from district to district. *Nolan v. Scafati*,[59] a Massachusetts case, held that a prisoner has no right to cross-examination, to summon witnesses, or to the assistance of counsel in a proceeding which could end in the imposition of solitary confinement and the postponement of his release. The only constitutional protections available are those "indispensible to fair and decent treatment, to avoidance of cruel and unusual punishment, and to preclusion of invidious discrimination."[60] It was viewed that the convict must be given notice of the charge, informed of the nature of the evidence, allowed to be heard, and may only be punitively treated when there is substantial evidence of guilt.[61]

The Northern District of New York, in holding that similar minimal standards of due process were violated in two cases[62] was in accord with the Massachusetts' view.[63] In both districts, discretionary action by penal personnel would not be subject to judicial scrutiny unless a substantial impairment of the prisoner's rights could be established.[64] Such a hindrance to the prisoner was deemed to exist in *Rodriguez v. McGinnis*[65] where the court explained that the need for security and swiftness of action cannot permit the disciplinary officer or officer of the review board to "assume legally the investigative mantle and become prosecutor, judge and jury,"[66] and in the same cases even assume the role of appellate court.[67]

The Southern District of New York in *Sostre v. Rockefeller*[68] had taken a more liberal view than either Massachusetts or the Northern District. In *Sostre* the plaintiff was placed in punitive segregation with the consequent loss of over one years' good time.[69] The court reasoned

60 *Id.* at 3.
61 *Id.*
62 Kritsky v. McGinnis, 313 F. Supp. 1247 (N.D.N.Y. 1970); Rodriguez v. McGinnis, 307 F. Supp. 627 (N.D.N.Y. 1969).
63 306 F. Supp. at 4.
64 *Id.*; 307 F. Supp. at 629.
65 *Id.*
66 *Id.* at 632.
67 *Id.*
68 312 F. Supp. 863 (S.D.N.Y. 1970).
69 Martin Sostre was ordered to punitive segregation by Warden Follette pursuant to

that the imposition of this austere punishment required certain procedural safeguards. It stated that the prisoner was entitled to a precise written notice of the charges and to have a hearing before an impartial official with concurrent rights to cross-examine and to call witnesses in rebuttal.[70] Moreover, a written record of the rationale of the decision and the evidence upon which it was reached was ordered.[71] Lastly, the court ruled that the plaintiff had a right to be represented by counsel or by a counsel substitute.[72]

The more recent Southern District decision in *Carothers v. Follette*[73] appeared to lend tacit approval to the guidelines set down by *Sostre*.[74] While acknowledging that the flexibility of prison discipline must be upheld and that there is no obligation upon the state to extend good time to a prisoner, the court maintained that the arbitrary removal of such credits cannot be permitted.[75]

In essence, the difference between the two views presented above concerns the prisoner's right to be represented by counsel, to conduct cross-examination, and to call witnesses in his own behalf. New York's Southern District supported the application of these rights while its Northern District and the Massachusetts District did not. This diversity of opinion simply demonstrates judicial conservatism as opposed to liberality. In Massachusetts an abundance of procedural safeguards was seen as an unwarranted burden upon the correctional system[76] while the Southern District of New York viewed it as a virtual neces-

§ 140 of the New York Correction Law. On the day of his confinement Sostre was called in by the warden, who purportedly was distressed over legal papers sent by Sostre to an attorney. Among these papers was a motion for use in the trial of another prisoner. Follette claimed he was upset that Sostre was, in effect, practicing law without a license and wanted assurances that this would not reoccur but Sostre refused.

At the same interview Sostre was asked about R.N.A., an organization he had referred to in past letters, but his reply to this query was a matter of dispute. The warden regarded this organization as subversive and due to a number of other circumstances, feared that riot and insurrection would take place. Moreover, there was a letter written by Sostre to his sister claiming that he would either be freed on appeal or by the "Universal Forces of Liberation." The court found that the plaintiff was not in solitary confinement due to any major or minor infraction of the rules. It was decided that his punishment was meted out for legal and Black Muslim activities during a prior incarceration. His advocation of black militancy was viewed to be an additional factor in prompting the punitive action. *Id.* at 867-70.

70 *Id.* at 872.

71 *Id.*

72 *Id.*

73 314 F. Supp. 1014 (S.D.N.Y. 1970).

74 *See id.* at 1028-29.

75 *Id.* at 1028.

76 306 F. Supp. at 4.

77 312 F. Supp. at 872. For a thought-provoking discussion of good-time revocation see Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969).

sity.[77] Nevertheless, both sides were in agreement that a prisoner must be accorded some procedural protection when facing revocation of good time. However, on appeal of the *Sostre* decision the Second Circuit struck down the procedural safeguards mandated by the lower court.[78]

While acknowledging that Sostre endured severe conditions, the circuit court refused to require that similar punishments in the future be limited to a specific length of time.[79] Moreover, a plea of limiting the punitive powers of prison officials led to the view that Sostre's punishment was not "unconstitutionally disproportionate to the offense."[80]

Moving to the question of procedural due process, the court considered the variety of safeguards present in the analogous areas of administrative law *i.e.*, termination of welfare payments,[81] withdrawal of residence in public housing,[82] probation revocation,[83] and parole release.[84] Of those mentioned, the court chose to align itself with the parole-release decision that it had reached in *Menechino v. Oswald.*[85] There, it was held that one seeking parole was not entitled to formal trial-type due process because the parole release proceeding is not adversarial in the same sense that a criminal proscution is adversarial.[86] This same view was adopted in *Sostre,* the court feeling that formal rules of evidence have no application to a disciplinary proceeding[87] and that prison authorities must have broad access to pertinent information to handle situations within the prison community.[88] Furthermore, it was felt that the need for legal skills was less acute in good-time revocation than in a probation revocation situation, for the court stated that "there is no likelihood that substantial rights would be sacrificed if a prisoner failed, for example, to raise a proper objection or to take a timely appeal, . . ."[89] In comparison to the situation where welfare payment termination is at issue, the evidence in a revocation proceeding was viewed to be of a more accessible and discernible

78 442 F.2d 178 (2d Cir. 1971).

79 The court also noted that segregated confinement is not of itself violative of the eighth amendment to the United States Constitution. *Id.* at 190-92.

80 *Id.* at 194.

81 Goldberg v. Kelly, 397 U.S. 254 (1970).

82 Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970).

83 Mempa v. Rhay, 389 U.S. 128 (1967).

84 Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970). *See also* Lewis v. Rockefeler, 439 F.2d 368 (2d Cir. 1970). *Cf.* Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970).

85 430 F.2d 403 (2d Cir. 1970).

86 *Id.* at 412.

87 442 F.2d 178, 196 (2d Cir. 1970).

88 *Id.*

89 *Id.*

nature.[90] Reaching this conclusion, the court then deduced that there was also a lesser mandate to cross-examine and call witnesses.[91]

Leaning on the above logic, the tribunal demonstrated a judicial reluctance to foist the application of procedural guarantees on peno-correctional officials. Remedial steps were left to state authorities as any imposition of due process was deemed to be a matter of conjecture without the requisite expertise.[92]

Thus, the appellate body rejected the district judge's finding that certain procedural elements were constitutional necessities of every proceeding, resulting in serious disciplinary action to a prison inmate. It reserved capricious and arbitrary action as the sole criteria for challenging decisions by prison officials.

Parole Revocation in New York

Parole in New York is a statutory grant of liberty to the prisoner contingent upon compliance with the conditions set down by the parole board.[93] The parolee is at liberty until allegation of a violation has been made. Then he is permitted to appear before the board and personally explain his actions.[94] Whether he will remain on parole or be returned to prison, lies within the discretion of the board.[95]

Until recently, the case law in the area of parole board-parolee confrontation demonstrated that New York courts were satisfied with the limited rights granted the parolee in revocation proceedings.[96]

Parole had been deemed a privilege affording the parolee only the right to a hearing and personal appearance granted by statute.[97]

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90 *Id.* at 196-97.

91 *Id.*

92 The court dismissed all analogous arguments presented by petitioner. *Id.* at 197-99.

93 N.Y. Correc. Law § 215 (McKinney 1960), *as amended*, L. 1970, c. 475 § 10, eff. Jan. 1, 1971.

94 N.Y. Correc. Law § 218 (McKinney 1968). This section was repealed, L. 1970, c. 476, § 44, effective sixty days after May 8, 1970 and can be presently found in § 212. However, the provision of this section continues to apply in cases where the sentence involved is for an offense committed prior to September 1, 1967, the effective date of the penal law.

95 *Id.*

96 People *ex rel.* Baker v. Follette, 33 App. Div. 2d 1052, 309 N.Y.S.2d 125 (2d Dep't 1970); People *ex rel.* Brock v. LaVallee, 33 App. Div. 2d 981, 307 N.Y.S.2d 981 (3d Dep't 1970); People v. Adams, 63 Misc. 2d 52, 310 N.Y.S.2d 7 (Schenectady County Ct. 1970).

97 People *ex rel.* Ochs v. LaVallee, 33 App. Div. 2d 80, 307 NY.S.2d 982 (3d Dep't 1969). The issue of what procedural rights are available to a resident alien facing possible exclusion is not unlike the one relating to parole. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1933) involved the denial of hearing on the basis that the information to be used was confidential. As a result, the petitioner was ordered permanently excluded. The Court stated that a resident alien's right to remain on American soil may be open to possible statutory change or other official regulation, but held that he is still entitled to due process. Moreover, the fact that one cannot be capriciously stripped of his residency status was not viewed as a danger to national security, because the alien had undergone a thorough

In addition, it had been viewed that no further rights were necessary since all such hearings are of the post-convictional variety.[98] Lower courts had also adopted this hands-off approach regarding correction procedure,[99] feeling that they should not become involved unless given the impetus by the legislature or some higher judicial authority.

For instance, in *People v. Adams* a convict on parole was held to be in constructive custody, a status which subjects him to the discipline of penal authorities while he is not actually incarcerated.[100] In essence, then, parole has been considered to require supervision consonant with the purpose of rehabilitation. Consequently, correction officials have been authorized to exercise a wide range of discretion.[101]

Until this year the only case of any magnitude in New York which departed from this trend of thought was *People ex rel. Combs v. LaVallee*.[102] There, as before, the question arose as to whether the refusal to grant the request to have counsel present at the revocation hearing was violative of due process. The court compared the parole situation to probation revocation, which permits representation by counsel, and concluded that the differences were not so great as to require counsel in one proceeding and deny it in the other.[103] Moreover, parole revocation was noted to be just as much a deprivation of liberty as an original criminal action and thus required the assistance of counsel.[104]

In spite of its seeming advance towards due process, this decision was handed down before the statutory change that altered the wording

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screening before being admitted to permanent residency. This argument is not overpowering, but it could conceivably be likened to the parole board-parolee relationship; for the board, too, examines the prisoner before releasing him. Thus, liberty, be it to stay in the United States or to remain free on parole, is a conditional status which merits at least minimal safeguards.

98 *Cf. id.* at 82, 307 N.Y.S.2d at 985.

99 People *ex rel* Baker v. Follette 33 App. Div. 2d 1052, 309 N.Y.S.2d 125 (1970). The rationale is that parole is a field of rehabilitation requiring the knowledge of experts. 33 App. Div. 2d at 1053, 309 N.Y.S.2d at 126.

100 63 Misc. 2d at 55, 310 N.Y.S.2d at 11. On a motion to suppress evidence obtained by the search of the parolee's premises without a warrant, the court noted that a parolee's rights are not equal to another, who is not under similar disability. Thus, to insure the power of the authorities the search was not deemed to be unreasonable.

101 *Id.*

102 29 App. Div. 2d 128, 286 N.Y.S.2d 600 (4th Dep't 1968).

103 29 App. Div. 2d at 131, 286 N.Y.S.2d at 603. The court noted only two appreciable differences between parole and probation. The first was that in parole the sentence may not be altered; the second that a parole violation might not be part of a criminal proceeding.

104 *Id.* The court also stated that the burden placed upon the parole administration would not be unduly heavy, as it was amply shouldered when counsel was permitted at coram nobis and habeas corpus proceedings. 29 App. Div. 2d at 132, 286 N.Y.S.2d at 604.

of section 218 of the New York Correction Law from an appearance before a "parole court"[105] to a presentation before "three members of such board of parole."[106] Thus, it seems that the court saw the board in an adversarial light due to the prior language while the alteration enabled later courts to avoid this approach and not grant any other rights than those statutorily required.[107] However, the recent Court of Appeals decision in *Menechino v. Warden*[108] casts this distinction aside.

Menechino was serving a prison term for conviction of second degree murder when released on parole in 1963. The following year he was declared delinquent and taken into custody. Subsequently, he went before a parole court for a revocation hearing and although there was no intimation or conviction of crime, his parole was revoked for a series of "technical violations." He appeared at that proceeding and later at three unsuccessful release hearings[109]—all without benefit of legal representation.

Chief Judge Fuld, writing for a 4-3 majority, first examined the correction law as it read at the time of Menechino's conviction and discerned that it gave "unfettered discretion" to the parole board in deciding the fate of a parolee facing revocation.[110] Reaching this conclusion and finding no clear precedent in the area, he went on to analogize the parolee's plight to that of a defendant facing revocation of probation.[111] While it was acknowledged that probation and parole were obviously different, it was felt that these dissimilarities should not militate against legal assistance where the loss of parole may result in the deprivation of liberty.[112] Thus, the breadth of *Mempa v. Rhay*[113] in the probation areas was viewed to encompass parole revocation as well, because both situations may be determined on a factual basis.[114] Moreover, the majority was in accord with the position that the issue

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105 The deletion of the reference to the parole court became effective April 11, 1968.

106 Note 1 *supra*.

107 An added dimension to parolee's rights in dealing with revocation by state parole boards can be noted by looking to *Warren v. Michigan Parole Board*, 23 Mich. App. 754, 179 N.W.2d 664 (1970), which sought to answer the question of whether a state statute which permits representation by counsel mandates that counsel be supplied to indigents at state expense. The court held that where there is a factual dispute, the presence of counsel is of primary import and his lack of attendance impairs fairness. Furthermore, the refusal to appoint counsel for indigent parolees in such a situation was deemed a denial of equal protection. *But see* Jones v. Rivers, 338 F.2d 862 (4th Cir. 1964).

108 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971).

109 For an account of denial of counsel at parole release hearings see Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970).

110 27 N.Y.2d at 380, 267 N.E.2d at 240, 318 N.Y.S.2d at 451.

111 27 N.Y.2d at 381, 267 N.E.2d at 240, 318 N.Y.S.2d at 452.

112 *Id.*, 267 N.E.2d at 241, 318 N.Y.S.2d at 453.

113 389 U.S. 128 (1967).

114 27 N.Y.2d at 381, 267 N.E.2d at 241, 318 N.Y.S.2d at 453.

of deprivation of liberty was just as serious then, as it was in the original action.[115] This being so, it was felt that it would be foolhardy to let the factual outcome hinge upon the parolee's possible inability to present his case.[116]

The import of *Menechino*, then, lies in the two new safeguards it has provided for a parolee facing re-imprisonment. First, he is entitled to be assisted by counsel in presenting the factual issues for determination and second, he may call witnesses on his behalf. Thus, some procedural protection is now there for the parolee's asking.

CONCLUSION

Within the past year the threads of procedural developments in the peno-correctional area have crossed. While the New York Court of Appeals has now acknowledged that minimal safeguards are available to parolees facing revocation, the Second Circuit Court of Appeals has severely restricted the procedural protection afforded a prisoner in a good-time revocation proceeding. Yet a few months ago the converse was true. The federal district court had required due process in good-time hearings but parolees in New York were deprived of similar rights.

Nevertheless, the question at present remains how may these two developments be reconciled? First of all, it should be noted that neither parole nor good-time are constitutionally mandated, but in both areas the courts have said that there is a definite governmental obligation to ensure against capricious revocation. In regard to parole, the facades of the right — privilege distinction and the *parens patriae* theory have been refuted to the point that officials cannot and should not any longer hide behind such fictional rationales. Moreover, in New York at least, the requirement of minimal due process has been judicially determined to necessitate positive action in the form of procedural safeguards. Decisions in the collateral areas of probation, alien exclusion, and public assistance are in accord with this position.

Still, the court in *Sostre* did not agree, for the only criteria it laid

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[115] 27 N.Y.2d at 382, 267 N.E.2d at 241, 318 N.Y.S.2d at 453.

[116] Here, for instance, the court noted that counsel could have assisted in a probing analysis of the parole supervisor's report. Moreover, he could have sifted facts and aided in preparation for the board hearing. In addition, the court viewed that both the New York State and United States Constitutions mandated an attorney and the right to introduce testimony if the parolee so chooses — no matter how the proceeding may be characterized. Further, administrative speed and convenience were not deemed to be excuse enough to disregard these constitutional demands, nor would the majority concur with the grace and waiver arguments proffered. 27 N.Y.2d at 382-84, 267 N.E.2d at 241-42, 318 N.Y.S.2d at 453-55.

down were those prohibiting arbitrary and capricious action by state officials. But good-time revocation, while not totally analogous to parole, may be close enough in point to also mandate greater procedural protection. Analogous was the methodology employed by the majority opinion in *Menechino*, where it likened parole to probation even though the two areas were not in perfect alignment. However, *Sostre* and *Menechino* are the products of two different judicial systems — one federal and the other state. Still, the due process issue is one of constitutional magnitude and therefore these two cases may be reconciled. Putting aside jurisdictional differences, the major reason for the diversity of views appears to be the concern over administrative difficulties. More specifically, the circuit court in *Sostre* demonstrated a fear of treading into an area where it was not as knowledgeable as correctional officials. Moreover, it was feared that the mandating of counsel would place too heavy a burden on the administrative process. But the majority in *Menechino* discounted this argument by seeing an overriding interest in protecting the parolee. Fundamentally, it all comes down to the strength and the breadth of the desire to provide procedural safeguards to an individual confined within the prison system. While there is probably some merit to the concern that the addition of counsel and other measures may place a drag on penal administration, the overriding interest in guarding against the potential unwarranted loss of liberty mandates the introduction of these safeguards. Conjecture that administration will be slowed to a crawl by attorneys seeking to turn proceedings into full-blown adversary hearings is merely an admission by officials that a high-speed process has preference over the individual. However, the trend is towards procedural protection in the so-called privilege area and concomitantly, the individual has priority over administration.